

### EARLY BILLS IN EQUITY.

"The first attempt to clear up the story of the Bill as we find it in the early Year Books, resulted in the conviction that the Bill as it was known in those early times had been respectfully neglected by all our writers upon the early law." These words, written some years ago, were the result of a prolonged search through all the authorities for some reference to the early procedure by bill instead of by writ. It was then found that the story of the Bill, as we begin now to be able to tell it, was not told in any of the histories of the law, or in any of the treatises upon equity. These bills were dimly suggested in the cases found in the early Year Books, but they were only suggested, and any inquiry only led to the answer that the bill in question must be the Bill of Middlesex. But it was clear that the Bills in question had nothing to do with the custody of the Marshall; they plainly bore no relation to the Bill of Middlesex. Crabb alone among historians seemed to have some faint idea of this other bill, for he says, "There were other modes of proceeding, of more ancient date than that by writ, which were more adapted to the extraordinary jurisdiction exercised by our kings at an early period, in the administration of justice. One of these proceedings was by bill."<sup>1</sup> Reeves, in his "History of English," shows that he knows something about bills, but has no authority to give for his knowledge, and he refuses to answer the questions about them which had evidently been put before him. He says, "Whatever conjectures may be formed concerning the origin of proceedings by bill, it is beyond all question that actions were brought in this way during all this reign [Ed. III] and the books are full of them. But we are not able to pronounce upon the nature and properties of this new method, as no debate arose upon it."<sup>2</sup> He does not give any references to the cases he mentions as so plentiful in the books, and apparently confuses the early bill with the

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<sup>1</sup> Crabb, History of the Common Law, pp. 281-2.

<sup>2</sup> Reeves, Hist. of Eng. Law, Vol. 3, p. 93, 3d Ed., L. 1914.

later ones, as he further says "nor does it appear from any of the cases reported, that in bills in the King's Bench there was any mention of the custody of the Marshall. If that was the ground of jurisdiction, it was so understood, and not thought necessary to be alleged."<sup>3</sup> Reeves was influenced, as every one seems to have been, by the idea that the proceeding by bill was that "special kind of bill which came to be known by the generic title of 'Bill of Middlesex.'"<sup>4</sup> Later writers, if any suggestion at all came to their minds through these hints of Crabb and Reeves, must have felt themselves too much involved in the mists of an old and unknown procedure to care to venture into their perplexities. They seem to have been satisfied by the explanation that in spite of appearances those bills, thus spoken of, were really Bills of Middlesex. Thus when information in regard to what seemed to be a real fact—the existence of a bill which had been commonly used, but which was not any of the known bills—was sought, no information was forthcoming. The cases did not furnish definite information—there was no absolute proof on this side of the Atlantic. But on the other side, in England, Mr. Bolland was editing, and editing most ably and interestingly, the Year Book Series of the Selden Society publications. He had access to, and examined, manuscripts which had hitherto remained unedited—unread even. In this search he found a bill which was unknown to him. In his search for knowledge of this bill he found, as had been found on this side of the water, that "not a single authority, ancient or modern, that I have consulted—and I have searched wherever instruction might be found—tells us anything of it."<sup>5</sup> This may not be quite fair to Crabb and Reeves, yet they certainly do not do more than put us on notice that such a bill might exist. To Mr. Bolland, however, all credit is due for the discovery of the bill itself. Lest we be again faced by the theory that this was not really a discovery but that we have

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<sup>3</sup> Reeves, *History of English Law*, Vol. 3, p. 93, 3rd Ed. L., 1814.

<sup>4</sup> Bolland, *Sel. Soc., Y. B. Series*, Vol. 7, *Eyre of Kent*, 6-7. Intro., p. xxiii.

<sup>5</sup> *Sel. Soc.*, Vol. 27, *Y. B. Series*, Vol. 7, Preface, p. xxi.

known about these bills all along, it may be well to quote Mr. Bolland to show what these bills are not. "In the first place, then, these bills in Eyre in lieu of writs were not the bills mentioned in the Roll recording the Trials of the Judges and other ministers of the King before the Commission instituted by Edward I. I know of no other place where the presentation of bills of the same kind as those mentioned in this Roll is referred to, . . . nor had these bills in Eyre with which I am now concerned any connection with the ancient bills mentioned by Lord Chief Justice Hale in his discourse concerning the Courts of King's Bench and Common Pleas. . . . Neither have they anything to do with that special kind of bill which came to be known by the generic title of bill of Middlesex." <sup>6</sup> Mr. Bolland then asks, "What then are they?" His final answer is that they are bills in Eyre, since he cannot find any evidence that such bills were ever presented anywhere else than in Eyre, or before some commission holding special powers from the king to receive and remedy complaints.<sup>7</sup> We have not only to deal with a discovery, but with a discovery which Mr. Bolland may very justly call "Perhaps the most important addition to our knowledge of our own legal history which has been made in late years. . . . All knowledge of it had been lost for, I suppose, nearly six hundred years, because the Year Books of the General Eyres in which it is buried had never been printed, had never, I suppose, even been read in the original manuscript by anybody since shortly after the days when they were written. You may search from cover to cover every book on our law and procedure and upon the history of our law and procedure that has been printed more than seven or eight years, and not a word will you find in any of them about Bills in Eyre." <sup>8</sup>

There was another reason why even the English scholar with his easy access to the manuscripts had been prevented from finding this knowledge. "I found a large collection of them in the Public

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<sup>6</sup> *Ib.*, pp. xxi-xxii.

<sup>7</sup> *Ib.*, xxii-xxiii.

<sup>8</sup> Bolland, *The Year Books*, p. 55.

Record Office, where they are catalogued under the misleading and disguising title of Assize Rolls. They have nothing of the nature of rolls, and have absolutely nothing to do with Assizes."<sup>9</sup> Yet over here in America there must have been more than one searcher after historical truth who "sensed" the existence of that which could not be seen with the physical eye.

It was as long ago as 1912 that this discovery was first made known to us. Mr. Bolland has written about it in his introductions to the Eyres of Kent, and to the Select Bills in Eyre, heretofore referred to. He has also written of them in his two little books, which embody the lectures given on the Year Books, and on the General Eyres, at the University of London in 1921 and 1922. Yet in spite of all this it does not appear that this new light on the history of bills in equity has penetrated very deeply into the general knowledge upon the subject. It is for this reason that it seemed that it might be of interest to set forth a little more at length just what these bills were; when they began and when they ended, and so connect them with the general history of the equitable jurisdiction of Chancery.

As usual we cannot go back to the beginning. It is everyday history that kings receive petitions from their subjects. But the king cannot do all things in person, and the business gets into the hands of commissions, courts and kindred institutions. Mr. Hazeltine in his introduction to the General Eyre of Mr. Bolland,<sup>10</sup> goes so far as to trace the beginnings of the jurisdiction of the Justices in Eyre to the *Missi* of the Frankish kings. Spence has the same idea apparently.<sup>11</sup> It is a perfectly good theory, but there is no proof given. When we arrive at proof of our bills we find that the Justices in Eyre have long been journeying, and it is hoped that earlier cases than any as yet found may be rescued from the records, but Mr. Bolland informs us that with the exception of some evidences of them in John's time, none have apparently survived earlier than 20 Ed. 1.<sup>12</sup> As these bills

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<sup>9</sup> Bolland, *The Year Books*, p. 56.

<sup>10</sup> P. xiii.

<sup>11</sup> Spence *Eq. Jur.*, Vol. 1, p. 101.

<sup>12</sup> *Sel. Soc.*, Vol. 30, *Select Bills in Eyre*, Intro., p. xv.

when we first meet with them seem to have assumed the form they were to retain as long as they survived, it may well be assumed that those which have survived are not among the very first that reached the justices on their journeyings.

The Eyres themselves were not beloved of the people; they were intended to exact from every class of the people as much revenue for the king's treasury as possible. If we may read a little between the lines of the reports of many of the Eyres the people went to them very unwillingly, and kept away from them when possible. Yet in these bills of Eyre we have the reverse of the picture; we find the people coming in voluntarily, eagerly asking with all the power that is in them that they that are put in the place of the king will do them justice, lest they literally die of hunger or in prison. The king, representative of royal pity and more than human benevolence, seemed a shelter and a refuge for the poorer sort against the cruel and unjust demands and exactions of their more immediate landlords and overlords. For these are mostly the poorer people who approach the justices with complaints and tales of sufferings and injustices. The petitions have no formal style, or at least no such form as was demanded by the writ. Apparently there is some well understood manner of addressing the justices, but nothing at all like a formula. The persons who drew up these petitions probably copied the later ones from the earlier. Of course it has to be assumed that they hired some clerk or person who could write and had some idea of what was wanted, since very few of the petitioners can be assumed to have been able to write their own petitions. One fancies that they sometimes injected their own ideas into the formal ones of the bill writer, since every once in a while there is a striking variation in the invocation, if it may be so called. "For God's sake," "For the love of Jesus Christ," "For God's sake and the soul of the queen," are common, but this seems an original cry, "For God's sake and your own soul's sake, if it please you, and for the queen's soul's sake, if it please you." The petitioner did not mean to lose any chances by leaving out any invocation that might reach the rather deaf ear of justice.

An example or two of the cases as they appear in the Select Bills in Eyre will show the range and content of the bills. A very early one is from the Shropshire Eyre, 20 Ed. 1 (1292):

"To the justices of our Lord the King. Alice, the daughter of Piers Knotte of Shrewsbury, makes complaint of Mabel, who was the wife of Richard of Berwyck, because this Mabel wrongfully detains from her the rent of a messuage in Shrewsbury, one penny and one-half penny for each year, and has detained this rent for twelve years past. For this she prays remedy for God's sake if you please and for the soul of the queen. For God's sake, Sir Justice, think of me, for I have none to aid save God and you."<sup>13</sup>

If we may reason from the matter of these cases and the manner of their presentation we may be entitled to believe that many of these petitions or bills grew out of grievances which had been taken to the Manor Courts or Baronial Courts, where the complainants were unable to get justice because they had to plead their causes before the very persons who were interested in seeing that justice was not done. The language of these bills is very like the language of the persons who come before the manor courts; there is a colloquialism about it that brings the person of the suitor before us, and we seem to hear the voices, silent so many centuries ago, that plead so eloquently for redress.

There is another interesting case in that same Shropshire Eyre of 20 Ed. 1:

"Dear Sire, I cry you mercy who are put in the place of our Lord the King to do right to the poor and the rich. I, John Feyrewyn make my complaint to God and to you, sir Justice, that Richard the carpenter, that is a clerk to the Bailiff of Shrewsbury, detaineth from me six marks, which I bailed him, and he by a writing bound himself to find me sustenance for the money which he received from me. And he does not keep the covenant which was between us, but as soon as he had the money he abandoned me, and bound my body and gave me a scrap of bread, as if I had been a poor man begging my bread for God's sake, and I nearly died of hunger. And for this, dear Sir, I cry you mercy for God's sake, that you will see that I get my money back before you depart out of this town; otherwise I shall never have my money back, for you must know that the rich people all hold together, so that the poor people shall not have any rights in this town. As soon, my Lord, as I have my money I will

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<sup>13</sup> Sel. Soc., Vol. 30, Select Bills in Eyre, p. 2, Case 3.

go to the Holy Land, and pray for the King of England, and for you especially, Sir John of Berewick, for know that I have no money to spend on a pleader. And for this, dear sir, have mercy on me that I may have my money back."

Endorsement. The defendant admitteth the agreement and breach, and the parties come to an agreement by leave of the Court.<sup>14</sup>

So in at least this one case, justice was apparently done; although the complainant was a poor man who could not hire a pleader, he seems to have done better without one than many others with one.

In order not to leave the impression that only the poor suitor used these bills, another case may be given which appears to show that the complainant in the last case was right when he said to the justices, "You who are put in the place of our Lord the King to do right to the poor and to the rich."

"Sir Richard of Leighton complaineth to the Justices of our Lord the King that Sir John Lestrangle wrongfully detaineth from him and doth refuse to pay him twenty marks of money; and wrongfully for this reason, to wit, that he is bound by a written obligation in respect of a horse which he had from him to pay the whole of the aforesaid money on the Feast of St. Michael in the twentieth year, upon which day he paid nothing and he still refuses to pay, to Richard's damage of twenty shillings, etc."<sup>15</sup>

They gave pledges to prosecute, but Sir Richard Leighton came into Court, and said that he did not wish to prosecute, so he and his pledges were amerced.

It is evident from cases like this that nobody was thinking whether there was an adequate remedy at law, or whether there was a writ which would cover the case. It was enough that the complainants had attempted to get justice and had failed, and that they believed—or at least said that they believed—that if the king did not do them justice there was no justice for them in this world. And it would appear that the justices often agreed with them, for they did not hold the suitors to the strict procedure of the writ although they might follow the formulas of practice.

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<sup>14</sup> Sel. Soc. 30, *Select Bills in Eyre*, p. 6, Case 11.

<sup>15</sup> Sel. Soc. 30, *Select Bills in Eyre*, p. 23, Case 38.

Not only could the bills be written by any one without any pretension to legal training, even without ordinary education, but the justices seemed to treat the cases very much as does the judge in a modern municipal court. "These bills were an appeal over the head of the law to the paternal powers, so to speak, of the king as father of his people, put where he was; to quote Bracton again, to serve as God's vicar on earth, to judge between right and wrong, to see that all his subjects bore themselves uprightly and honestly, that none harmeth another; that every man kept unimpaired that which was rightly his;" so that "slips that would have been immediately fatal in a writ were put straight in a bill without any detriment to the complainant."<sup>16</sup>

There were formalities, of course. The complainants were held to the usual responsibility for their charges; it was necessary that they should find pledges to prosecute, and we find the names of the pledges filed with the complaint. But even here mercy was shown, and those too poor to find pledges were allowed to take oath to that effect, and the complaints were allowed without any other surety.

The bills were delivered to the sheriff and the sheriff was bidden to have three clerks, one to carry out the commands of the justices hearing common pleas, another to be in attendance on the justices hearing bills, and the third to be in attendance on the justices hearing Pleas of the Crown.<sup>17</sup> This provision would lend color to the idea that these bills were heard at separate sittings of the court, which gives us a mental picture of an Eyre sitting separately as a Court of Equity. We feel that we have come upon the first real knowledge that has been vouchsafed us as to the rise of the equity jurisdiction. Mr. Bolland says, "I think that there can be no doubt that these bills are the very beginning of the equitable jurisdiction."<sup>18</sup> And having found the beginning we may go on and find the answer to some matters which have been troubling the writers on equity for a very long time.

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<sup>16</sup> Bolland, *The General Eyre*, pp. 75-76.

<sup>17</sup> *Sel. Soc., Eyre of Kent*, Vol. 2, Preface, p. xxviii.

<sup>18</sup> *Ib.*, p. xxviii.



We find in the first place that the Eyres before which these bills were brought, ceased about the tenth year of Edward III, and, necessarily, that the Bills in Eyre ceased at the same time. We find also that the authorities, dim as their light is in regard to the beginnings of the jurisdiction of the Court of Chancery "As a regular Court for administering extraordinary relief," are pretty well agreed that it began with the proclamation issued by Edward III in the twenty-second year of his reign.<sup>19</sup> "From this time suits by petition or bill without any preliminary writ, became a common course of procedure before the Chancellor, as it had been in the Council."<sup>20</sup> The co-incidence of dates here is extraordinary if there is no connection between them. The Eyres cease, the remedy for evils which the law had failed to cure ceased also. The king ceased to act through his justices itinerant. Throughout the country there is no help anywhere; the king himself is the only resource. Then comes to the king this extraordinary rush of petitions, so that, "The king, being as may well be conceived, looking to the history of his busy reign, unable from his other avocations to attend to the numerous petitions which were presented to him, he, in the twenty-second year of his reign, by a writ or ordinance referred all such matters as were of *Grace* to be dispatched by the Chancellor or by the Keeper of the Privy Seal."<sup>21</sup> In this same connection, or co-incidence we appear also to have a more reasonable explanation of the jurisdiction of equity over criminal as well as civil matters. This is a point which has apparently puzzled the historians. They agree with Spence,<sup>22</sup> who seems to think that "The terms 'Honesty,' 'Equity' and 'Conscience,' . . . would rather lead to the supposition that the jurisdiction as originally exercised was confined to cases of a nature purely civil." Spence decides that the disorders of the reign of Edward III, and the insufficiency of the means of preserving peace, caused the Chancellor to exercise his

<sup>19</sup> Spence, *Eq. Jur.*, Vol. 1, p. 338; Burroughs, *Legal Procedure in Chancery Stated*, pp. 30-31, L. 1727.

<sup>20</sup> Spence, *Eq. Jur.*, Vol. 1, p. 338.

<sup>21</sup> *Ib.*, Vol. 1, p. 337.

<sup>22</sup> *Ib.*, p. 341.

authority over matters of a criminal nature. Yet we have seen that the Justices in Eyre took cognizance through the extraordinary powers they possessed as representing the king, of all matters, civil and criminal. The cases printed in the volume of Select Eyres show that every phase of life passed in review before them, and that they had many cases of assault, sometimes amounting to serious maiming and mutilating, and trespasses that resulted in burnings, and carrying away of all the household goods and cattle. So, although the disorders of the reign of Edward III may have contributed to continue the jurisdiction of the Chancellor over matters of a criminal nature, it becomes apparent in the light of these many criminal cases in the Eyres that the Chancellor was simply continuing to exercise the jurisdiction that had been exercised by the Justices in Eyre at least since the reign of John, and possibly if not probably from the reign of the first William.

Mr. Pike in his article on "Common Law and Conscience"<sup>28</sup> in commenting on the case of *Hals v. Hyndley*, an unreported case, says, "But the whole transaction was very different from that of sending an issue to be tried in another court, and comes very near if it does not actually amount to the calling of a jury by the authority of the Chancery itself for the purpose of trying an issue joined in the Chancery. This, it has generally been said, the Chancery had not the power to do." But this was what the justices in dealing with Bills in Eyre had been doing all the time. "These bills were tried by juries just as writs were; and as the justices freed themselves, when managing and directing these trials, from the restraints and shackles of the ordinary procedure in a way which they would never have thought of doing when hearing actions tried under writs, so I am inclined to think, they treated the jurors trying bills with somewhat more freedom than jurors trying actions by writ, sending them back to reconsider the amount of damages to which a complainant was entitled when they thought that too small a one had been found, and even in a charge of serious crime accepting the verdict of only a majority

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<sup>28</sup> 1 Law Quarterly Rev., pp. 443-454.

of the jury, and without thinking of asking for the defendant's consent to such a course."<sup>24</sup>

Pike himself states that "It is however clear that a power existed, and was actually exercised, to obtain the verdict of a jury in proceedings by Bill addressed to the Chancellor without the aid of the Courts of King's Bench or Common Pleas. The power did not, perhaps, exist in the Court of Chancery, but may have been derived from a higher source."<sup>25</sup> Reeves, Spence, Pike, all feel uneasily that there was something unaccounted for in the actual procedure of the Chancery in the earlier years. As Pike says there may be "a higher source" from which these powers have been derived. They all know and uneasily acknowledge that there is a something which does not agree with the later theories, but which did actually exist. This something we may now confidently declare was this earliest procedure in equity—the Bill in Eyre. Having found so much it is very much to be hoped that more may yet be found. Mr. Bolland discovered the Bill in Eyre while working on the General Eyre, and completely innocent of any suspicion that there was any such thing as the bill he found. Maitland said, "It is believed that the materials for a history of the beginnings of equity are to be found at the Record Office in great abundance. It is high time that they should be used."<sup>26</sup> Pike in his "Common Law and Conscience,"<sup>27</sup> says in citing *Hals v. Hynckley*, "This case exists among the class of documents known in the Public Record Office as 'County Placita' and generally supposed to belong to the Common Law side of the Court of Chancery. (County Placita, Essex, No. 75.) It was found by chance, during a search made with the object of illustrating by the corresponding record, a report in the Year Books of a *scire facias* in the Chancery. It is, however, but one of innumerable instances in which the legal historian might find altogether new material among the

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<sup>24</sup> Bolland, *The General Eyre*, p. 86.

<sup>25</sup> Pike, *Common Law and Conscience in Chancery*, 1 *Law Quarterly Rev.*, p. 450.

<sup>26</sup> Maitland, *English Legal History*, *Collected Papers*, Vol. 2, p. 57, note.

<sup>27</sup> 1 *Law Quarterly Rev.*, p. 445, note.

Public Records, and in which the value of the Public Records might be brought into greater prominence by careful study from a legal point of view."

Since we have now had found for us those beginnings of the history of equity, which Maitland with his sure vision believed would be found in great abundance, and since this new knowledge has been come upon by chance, it seems that if any one has interest to really look for the material which still awaits the seeker it may be found. No one can now write a history of equity, founding it upon any book heretofore written. Inference and guess work were the best that they could give us, not having the data upon which to build a sure foundation. It will be a most interesting work for some one to carry on this investigation into the early records, and so, slowly perhaps, but surely to put together the true story of the rise, the real manner of growth and development of the equity jurisdiction in English legal history.

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